

Question 8

The High Court, rather than referendums, has had a greater impact on constitutional change in Australia.

Evaluate the validity of this claim.

(25 marks)

Excellent
23.5/25
marks

The High Court of Australia (HCA) has had a significant impact upon constitutional change in Australia (Aust) since Federation. Referendums have also had a significant impact on constitutional change in Australia since Federation. High Court decisions have the ability to change the interpreted meaning of the Constitution, whereas referendums (in accordance with s128 of the Australian Constitution) are the only way to change the written word of the Constitution. Although referendums are the only method to formally alter the "written word" of the Constitution, their impact, especially in recent times, has been more limited than that of HCA decisions. When evaluating the validity of this claim it must be accepted that both methods are significant but the statement remains valid to a substantial extent.

Clearly identifies how referendums and the High Court effect constitutional change, highlighting one is formal and the other is informal.

In order to pass a referendum in Australia, the Houses of a bill must first be introduced into one of the Houses of Parliament, where it must be passed with a majority to proceed. (If this referendum is passed, bill is passed by the other House of Parliament, or the same House twice (within 3 months); it can then proceed. The bill must receive "royal assent" (royal assent) by the G/G and then it may be

Outlines the referendum process and makes reference to particular referendums and discusses the impact of these.

Question number: 8

put to the people in a vote. If the vote receives a majority of "Yes" votes and a majority of state "Yes" votes a change to the Constitution will occur. This complicated and very difficult process (only 8/44 referendums have passed) under s128 of the Constitution has made it very difficult and rare for constitutional change to occur. In Australia, the last referendum passed was in 1999 on the Republic and it failed by 55%. The referendums that pass, tend to be insignificant changes, represent Australian values (e.g. Aboriginal 1967) or are improving democratic institutions (e.g. Local Governments in 1977). In recent years and since federation referendums have only had a relatively limited impact.

The HCA has had a far more significant impact on constitutional change in Australia. This is HCA judgments are able to vary the interpreted meaning of the Constitution and as such change what is understood to be meant by the Constitution. Varying approaches of legislation (e.g. Chief Justice Brand) and activism (e.g. Murray) have resulted in the interpretation of different sections changing over time. In 1920 the 'Engineers Case' (*Amalgamated Society of Engineers v. Sh*) was a landmark case that caused significant change to the interpretation of the Constitution and its meaning. In this case, the court

Offers a conclusion about the impact of referendums on constitutional change.

Makes reference to particular High Court cases and evaluates their impact.

Question number: 8.

took an all inclusive approach to s51 of the Constitution, not seeing any limits to the power of the Commonwealth govt. to legislate in these areas of power. This approach has been continued and has caused significant constitutional change - instead of a focus on protecting the states, HCA judgments have led to increased power of the Commonwealth and marked changes to the federal balance. When evaluating the "Engineers line" it should be accepted that it caused significantly more constitutional change than many precedents.

The "Workchoices" (Workplace Relations Amendment Act 2005) was a significant piece of legislation that gave greater power to employers. This legislation was challenged in the High Court and in 2006, the legislation was deemed constitutional under the power of the Commonwealth in respect to s51(xx) and s51(xxxv). The corporations and industrial relations powers enabled the Commonwealth to pass this legislation and maintain its validity. The High Court decision was another significant impact on constitutional change. The HCA had once again widely interpreted the powers of the Commonwealth govt. This legislation or the HCA decision did not change the actual written Constitution, but rather the meaning of what was interpreted.

Utilises the Engineers and Workchoices cases to demonstrate how the High Court has had a greater impact on constitutional change.

Question number: 2:

The HCA system of referendums has however also brought about significant constitutional change. In 1966, the Social Services referendum gave new powers in relation to the provision of these services. In 1967, the Aboriginal referendum, proved to be the most effective means of removing the racist provisions from the constitution (including s51 education and s127). Although this was more of a symbolic victory, in this instance HCA judgments would not have been sufficient to officially change these sections and provide the ~~Aboriginal~~ Commonwealth with the right to legislate in respect to Aborigines and count them in the census. Therefore, in the case of the 1967 referendum (which passed by 90.77% of yes votes) the referendum was the most effective means of constitutional change and had the greatest impact, highlighting an inability with the statement -

~~Other~~

Other referendums have also had a greater impact than the HCA in certain situations. These include the Local Government referendum and the Retirement of Judges both in 1977. It would have been ~~impossible~~ for the High Court to establish such precedents because the Local Government system in the State, operated under conventions, ~~whereas~~ the and the Judges had no legal requirement to retire

Refers back to referendums to discuss the impact on constitutional change.

Question number: 8.

led upon 70, before the referendum. Thus the referendum ~~constitution~~ changes once again had the potential impact on changing the constitution. When evaluating the validity of the statement, it should be accepted that it is valid to a limited extent in that referendums can sometimes be bring about changes to the constitution which may not or could not have been brought about by the High Court's interpretation of the constitution.

The HCA is responsible for the interpretation of the constitution (s76) and its subsequent application to specific cases. Other cases that have brought about constitutional change include *Rov. Withers v. SUC*. In this case R. Williams challenged the funding of the two chaplains by the Commonwealth for Scripture Union QLD. The result of this case was that under s61 the chaplain funding was ultra vires of the Commonwealth's power. In addition, the majority of the court ruled that the s116 of the constitution did not accept that a chaplain was an officer under the Commonwealth. Therefore, the High Court's judgement changed the interpreted meaning of both sections 61 and 116. It is not illegal or unconstitutional for chaplains to exist at schools as it does not violate s116 or freedom of religion, but it is ultra vires of the Commonwealth's funding power.

Provides relevant examples to provide evidence to support conclusions.

Uses relevant political and legal terminology through the discussion.

The Other HCA division has also brought about significant constitutional change, including the recent *Plain Packaging* (Tobacco Litigation) challenge in the High Court. The new HCA decision found that it was not unconstitutional for the compulsory acquisition of intellectual property as long as no-one else is benefited. S51(XXXI) prevents acquisition of property on unjust terms, meaning that there must be 'just compensation'. In this case, the HCA ruled that, (as no-one benefited from the plain packaging laws - esp. the Commonwealth) the intellectual property was acquired on just terms. This case caused a significant change to the constitutional interpretation as it set a limit to the compensation for loss of intellectual property.

When evaluating the validity of the statement it must be accepted that High Court decisions have had the greater impact on constitutional change in Australia. Although some changes can only be made by the referendum process (e.g. *Aboriginals* 1967), the vast majority of changes have occurred due to changes in the interpreted meaning of the Constitution.

Presents a balanced and coherent evaluation of the claim that the High Court rather than referendums has had a greater impact on constitutional change in Australia.

Refers back to the key aspect of the question in the conclusion.